

1997

State of Utah v. Cynthia Hinson and David Hinson : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

Julia D'Alesandro
Clerk of the Court

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ARGUMENT

The defendants are not entitled to attorney fees. Rule 33 the Utah Rules of Appellate Procedure states that there may be damages for delay or frivolous appeal, neither of those reasons exist in this case. Utah R. App. P. 33.

The defendants allege this appeal by the State is frivolous. Rule 33 defines frivolous as "one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law." Utah R. App. P. 33. The appeal in this case is warranted on existing law. Both the Utah Code and the Utah Rules of Criminal Procedure allow the State to appeal from "a final judgment of dismissal." Utah R. Crim. P. 26(3)(a) and Utah Code Ann. §77-18a-1(2)(a) (1995, Supp. 1997). The case law stated in the State's brief supports the propositions and positions set forth in the brief and the issues presented are grounded and warranted in that existing law.

The judgment appealed from by the State had not been litigated multiple times and the appeal was not sought for the purpose of delay. This is not a case where an issue has been litigated over and over. The issue was an issue of first

impression in the district court. The State had and still has legitimate concerns with the existing law, the interpretation thereof, and the actions of the district court.

Sanctions are not warranted in this case. The Utah Court of Appeals in the Maughan v. Maughan, 770 P.2d 156 (Utah Ct. App. 1989) case quoting Porco v. Porco, 752 P.2d 365, 369 (Utah App. 1988) states that sanctions are only to be ordered in limited cases, "The 'sanction' for bringing a frivolous appeal is applied only in the egregious cases, 'lest there be an improper chilling of the right to appeal erroneous lower court decisions.'" 770 P.2d at 162. The court goes on to define egregious cases, "Egregious cases may include those obviously without merit, with no reasonable likelihood of success, and which result in the delay of a proper judgment." Id. Such is not the case here and the defendants have not alleged that this appeal is an egregious case. The defendants have not met the burden for an award of sanctions and this appeal does not warrant sanctions. The State's appeal is legitimate and not devoid of merit. An appeal may be unsuccessful but that does not mean that it is not worthy of consideration or that it should be subject to the sanctions of Rule 33. See generally Id.

CONCLUSION

The State's appeal was and is not frivolous. The appeal is warranted by existing law. The Defendants are not entitled to attorney fees and costs.

RESPECTFULLY SUBMITTED this 28th day of May, 1998.

Daggett County Attorney

By: Rachelle L. Palmer
Rachelle L. Palmer

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FILED

Utah Court of Appeals

MAY 28 1998

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,)	
)	
Plaintiff/Appellant,)	CERTIFICATE OF SERVICE
)	OF APPELLANT'S REPLY BRIEF
vs.)	
)	
CYNTHIA HINSON and)	
DAVID HINSON,)	
)	
Defendants/Appellees.)	Case No. 970638-CA

I, Rachelle L. Palmer, certify that on May 28, 1998, I served two copies of the Appellant's Reply Brief upon D. Bruce Oliver, the counsel for the Defendants/Appellees in this matter, by mailing it to him by first class mail with sufficient postage prepaid to the following address: D. Bruce Oliver, Attorney at Law, 180 South 300 West, Suite 210, Salt Lake City, Utah 84101-1490.

DATED this 28th day of May, 1998.

Daggett County Attorney

By: Rachelle L. Palmer
Rachelle L. Palmer

CERTIFICATE OF MAILING

I do hereby certify that I hand delivered or mailed, postage prepaid, a true and correct copy of the foregoing Certificate of Service to D. Bruce Oliver, Attorney at Law, 180 South 300 West, Suite 210, Salt Lake City, Utah 84101-1490 on this 28th day of May, 1998.

Christina Dancy

dag19\A:hinson2.cos

ADDENDUM

Rule 33. Damages for delay or frivolous appeal; recovery of attorney's fees.

(a) *Damages for delay or frivolous appeal.* Except in a first appeal of right in a criminal case, if the court determines that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney fees, to the prevailing party. The court may order that the damages be paid by the party or by the party's attorney.

(b) *Definitions.* For the purposes of these rules, a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law. An appeal, motion, brief, or other paper interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion, brief, or other paper.

(c) *Procedures.*

(1) The court may award damages upon request of any party or upon its own motion. A party may request damages under this rule only as part of the appellee's motion for summary disposition under Rule 10, as part of the appellee's brief, or as part of a party's response to a motion or other paper.

(2) If the award of damages is upon the motion of the court, the court shall issue to the party or the party's attorney or both an order to show cause why such damages should not be awarded. The order to show cause shall set forth the allegations which form the basis of the damages and permit at least ten days in which to respond unless otherwise ordered for good cause shown. The order to show cause may be part of the notice of oral argument.

(3) If requested by a party against whom damages may be awarded, the court shall grant a hearing.

Advisory Committee Note. — Rule 33 is substantially redrafted to provide definitions and procedures for assessing penalties for delays and frivolous appeals.

If an appeal is found to be frivolous, the court must award damages. This is in keeping with Rule 11 of the Utah Rules of Civil Procedure. However, the amount of damages — single or double costs or attorney fees or both — is left to the discretion of the court. Rule 33 is amended to make express the authority of the court to

impose sanctions upon the party or upon counsel for the party. This rule does not apply to a first appeal of right in a criminal case to avoid the conflict created for appointed counsel by *Anders v. California*, 386 US 738 (1967) and *State v. Clayton*, 639 P.2d 168 (Utah 1981). Under the law of these cases, appointed counsel must file an appeal and brief if requested by the defendant, and the court must find the appeal to be frivolous in order to dismiss the appeal.

NOTES TO DECISIONS

Frivolous appeal.

— Defined.

— Sanctions.

Cited.

Frivolous appeal.

A husband's appeal from a judgment relating to alimony and distribution of marital property was frivolous, where there was no basis for the argument presented and the evidence and law was mischaracterized and misstated. *Eames v. Eames*, 735 P.2d 395 (Utah Ct. App. 1987).

Plaintiff's counsel violated rule and was therefore subject to sanction when, after he investigated plaintiff's malpractice action against defendant orthodontist and found that he could not prove breach of duty or causation, the record was devoid of any relevant, admissi-

ble evidence showing negligence, and after losing on summary judgment, he persisted in filing an appeal. *Hunt v. Hurst*, 785 P.2d 414 (Utah 1990).

An appeal brought from an action that was properly determined to be in bad faith is necessarily frivolous under this rule. *Utah Dep't of Social Servs. v. Adams*, 806 P.2d 1193 (Utah Ct. App. 1991).

Attorney who, after a case had been fully adjudicated, chose to ignore the decision and attempted to relitigate the same case violated Subdivision (a) of this rule and was therefore subject to sanctions. *Schoney v. Memorial Estates, Inc.*, 863 P.2d 59 (Utah Ct. App. 1993).

— Defined.

For purposes of this rule, a "frivolous" appeal

is one having no reasonable legal or factual basis. Lack of good faith is not required. *O'Brien v. Rush*, 744 P.2d 306 (Utah Ct. App. 1987).

A frivolous appeal is one without reasonable legal or factual basis. *Backstrom Family Ltd. Partnership v. Hall*, 751 P.2d 1157 (Utah Ct. App. 1988); *Maughan v. Maughan*, 770 P.2d 156 (Utah Ct. App. 1989).

—Sanctions.

Sanctions for frivolous appeals should only be applied in egregious cases, to avoid chilling the right to appeal erroneous lower court decisions. However, sanctions should be imposed when an appeal is obviously without any merit and has been taken with no reasonable likelihood of prevailing. *Porco v. Porco*, 752 P.2d 365 (Utah Ct. App. 1988); *Maughan v. Maughan*, 770 P.2d 156 (Utah Ct. App. 1989).

Cited in *Barber v. Barber*, 792 P.2d 134 (Utah Ct. App. 1990); *Hurt v. Hurt*, 793 P.2d 948 (Utah Ct. App. 1990); *Mahas v. Rindlisbacher*, 808 P.2d 1025 (Utah 1990); *Govert Copier Painting v. Van Leeuwen*, 801 P.2d 163 (Utah Ct. App. 1990); *Mont Trucking, Inc. v. Entrada Indus., Inc.*, 802 P.2d 779 (Utah Ct. App. 1990); *Allred v. Allred*, 807 P.2d 350 (Utah Ct. App. 1991); *Walters v. Walters*, 812 P.2d 64 (Utah Ct. App. 1991); *Griffin v. Memmott*, 814 P.2d 601 (Utah Ct. App. 1991); *Hinckley v. Hinckley*, 815 P.2d 1352 (Utah Ct. App. 1991); *Larson v. Overland Thrift & Loan*, 818 P.2d 1316 (Utah Ct. App. 1991); *Roberts v. Roberts*, 835 P.2d 193 (Utah Ct. App. 1992); *Holm v. Smilowitz*, 840 P.2d 157 (Utah Ct. App. 1992); *Rimensburger v. Rimensburger*, 845 P.2d 960 (Utah Ct. App. 1992); *DeBry v. Cascade Enters.*, 935 P.2d 499 (Utah 1997).

COLLATERAL REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d Appellate Review §§ 918, 937.

C.J.S. — 5 C.J.S. Appeal and Error § 637.

A.L.R. — Inherent power of federal district

court to impose monetary sanctions on counsel in absence of contempt of court, 77 A.L.R. Fed. 789.

Rule 34. Award of costs.

(a) *To whom allowed.* Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment or order is affirmed, costs shall be taxed against appellant unless otherwise ordered; if a judgment or order is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment or order is affirmed or reversed in part, or is vacated, costs shall be allowed as ordered by the court. Costs shall not be allowed or taxed in a criminal case.

(b) *Costs for and against the state of Utah.* In cases involving the state of Utah or an agency or officer thereof, an award of costs for or against the state shall be at the discretion of the court unless specifically required or prohibited by law.

(c) *Costs of briefs and attachments, record, bonds and other expenses on appeal.* The following may be taxed as costs in favor of the prevailing party in the appeal: the actual costs of a printed or typewritten brief or memoranda and attachments not to exceed \$3.00 for each page; actual costs incurred in the preparation and transmission of the record, including costs of the reporter's transcript unless otherwise ordered by the court; premiums paid for superseas or cost bonds to preserve rights pending appeal; and the fees for filing and docketing the appeal.

(d) *Bill of costs taxed after remittitur.* When costs are awarded to a party in an appeal, a party claiming costs shall, within 15 days after the remittitur is filed with the clerk of the trial court, serve upon the adverse party and file with the clerk of the trial court an itemized and verified bill of costs. The adverse party may, within 5 days of service of the bill of costs, serve and file a notice of objection, together with a motion to have the costs taxed by the trial court. If there is no objection to the cost bill within the allotted time, the clerk of the trial court shall tax the costs as filed and enter judgment for the party entitled thereto, which judgment shall be entered in the judgment docket with the same force and effect as in the case of other judgments of record. If the cost bill

justified. *Salt Lake City v. Hanson*, 19 Utah 2d 32, 425 P.2d 773 (1967).

Good cause for delay.

Defendant, who was charged at a time he had other case pending against him and in one of those cases requested and received psychiatric examination and who was appointed various counsel because of necessity and at his own request, was not denied right to speedy trial where he was held sane on August 14, 1969 and trial was initially set for January 7, 1970 and commenced on April 8, 1970, after disposition of defendant's motion to dismiss made on January 7. *State v. Carlsen*, 25 Utah 2d 136, 478 P.2d 326 (1970).

Magistrate's authority to dismiss.

City court judge acting as a committing magistrate upon a preliminary examination did not have authority to dismiss criminal proceedings. *Van Dam v. Morris*, 571 P.2d 1325 (Utah 1977).

Offense improperly alleged.

In prosecution for rape of female under 18 years of age, where defendant was given preliminary examination on complaint charging rape had been committed on April 1, and information charged rape on that date, but proof showed that female was then over 18 years of age, and state promptly introduced evidence of prior acts of intercourse before female became 18, conviction could not be upheld since defendant was not given benefit of preliminary examination for offense for which he was convicted. *State v. Hoben*, 36 Utah 186, 102 P. 1000 (1909).

Reasonableness of delay.

Fact that information was not filed within 30 days after defendant's commitment, did not

entitle defendant to discharge, where good cause for delay was shown. *State v. Reynolds*, 24 Utah 29, 66 P. 614 (1901).

Review of bindover orders.

A district court's jurisdiction over a motion to quash a bindover order follows from the authorization in Subdivision (a) of dismissal of indictments and informations. The motion focuses a district court's attention on the propriety of its exercise of original jurisdiction, requiring a determination of whether it can proceed with the case. The motion is not equivalent to an appeal. *State v. Humphrey*, 823 P.2d 464 (Utah 1991).

Statutes not in conflict.

There was no conflict between statutes providing for dismissal of and bar to further prosecutions against a sole defendant for misdemeanors only and other statutes providing for dismissal of and bar to further prosecutions, whether felony or misdemeanor, against one of several joint defendants for purpose of allowing dismissed to be witness for the state. In re Petty, 18 Utah 2d 320, 422 P.2d 659 (1967).

Subsequent prosecution.

Where district court erroneously dismissed ordinance violation prosecution on appeal from city court but before arraignment and trial de novo in district court and that order of dismissal was later reversed by the Supreme Court, subsequent prosecution of defendant in district court for the ordinance violation was not "any other prosecution" within the bar of this section, it was merely the same prosecution which had never been begun de novo in the district court and thus was not barred. *Boyer v. Larson*, 20 Utah 2d 121, 433 P.2d 1015 (1967).

COLLATERAL REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d Criminal Law §§ 512 to 519; 21A Am. Jur. 2d Criminal Law §§ 859 to 875.

C.J.S. — 22A C.J.S. Criminal Law § 610 et seq.

A.L.R. — Construction and effect of statute authorizing dismissal of criminal action upon settlement of civil liability growing out of act charged, 42 A.L.R.3d 315.

Propriety of court's dismissing indictment or prosecution because of failure of jury to agree after successive trials, 4 A.L.R.4th 1274.

What constitutes "manifest necessity" for state prosecutor's dismissal of action, allowing subsequent trial despite jeopardy's having attached, 14 A.L.R.4th 1014.

When does delay in imposing sentence violate speedy trial provision, 86 A.L.R.4th 340.

Rule 26. Appeals.

(1) An appeal is taken by filing with the clerk of the court from which the appeal is taken a notice of appeal, stating the order or judgment appealed from, and by serving a copy of it on the adverse party or his attorney of record. Proof of service of the copy shall be filed with the court.

(2) An appeal may be taken by the defendant from:

- (a) the final judgment of conviction, whether by verdict or plea;
- (b) an order made, after judgment, affecting the substantial rights of the defendant;
- (c) an interlocutory order when, upon petition for review, the appellate court decides that the appeal would be in the interest of justice; or

(d) any order of the court judging the defendant by reason of a mental disease or defect incompetent to proceed further in a pending prosecution.

(3) An appeal may be taken by the prosecution from:

(a) a final judgment of dismissal, including a dismissal of a felony information following a refusal to bind the defendant over for trial;

(b) an order arresting judgment;

(c) an order terminating the prosecution because of a finding of double jeopardy or denial of a speedy trial;

(d) a judgment of the court holding a statute or any part of it invalid;

(e) an order of the court granting a pretrial motion to suppress evidence when, upon a petition for review, the appellate court decides that the appeal would be in the interest of justice;

(f) under circumstances not amounting to a final order under subsection (3)(a), a refusal to bind the defendant over for trial on a felony as charged or a pretrial order dismissing or quashing in part a felony information, when upon a petition for review the appellate court decides that the appeal would be in the interest of justice; or

(g) an order of the court granting a motion to withdraw a plea of guilty or no contest.

(4)(a) All appeals in criminal cases shall be taken within 30 days after the entry of the judgment appealed from, or, if a motion for a new trial or arrest of judgment is made, within 30 days after notice of the denial of the motion is given to the defendant or his counsel. Proof of giving notice shall be filed with the court.

(b) An appeal may not be dismissed except for a material defect in taking it, or for failure to perfect the appeal, or upon motion of the appellant. The dismissal of the appeal affirms the judgment unless another appeal may be, and is, timely taken.

(5) Cases appealed in which the defendant is unable to post bond shall be given a preferred and expeditious setting in the appellate court.

(6) Appeals may be submitted on briefs. If an appellant's brief is filed, the appeal shall be decided even though a party, upon notice of the hearing, fails to appear for oral argument.

(7) The rules of civil procedure relating to appeals govern criminal appeals to the appellate court, except as otherwise provided.

(8)(a) In appeals to the Supreme Court of capital cases where the sentence of death has been imposed, appellant briefs shall be filed within 60 days of the filing of the record on appeal. Respondent briefs shall be filed within 60 days of receipt of the appellant brief. All issues to be raised on appeal shall be included by each party in its appellate brief. Appellant reply briefs shall be filed within 30 days of receipt of the respondent's brief.

(b) One 30-day extension of the 60-day filing period may be granted to each party, but only upon application to the Supreme Court showing extraordinary circumstances warranting an extension.

(c) The Supreme Court shall schedule the oral arguments of the case to be heard not more than ten days after the date of filing of the final brief. Following oral arguments, the case shall be placed first on the Supreme Court's calendar, for expeditious determination.

(9) After an initial appeal has been resolved, a subsequent appeal of a capital case where the sentence of death has been imposed may not be entertained by any court, nor may a stay of execution of the sentence be granted, when the appeal does not raise any new matter not previously resolved or when new matter could have been raised at the previous appeal.

(10) In capital cases where the sentence of death has been imposed and the defendant has chosen not to pursue his appeal, the case shall be automatically reviewed by the Supreme Court within 60 days after certification by the sentencing court of the entire record, unless the time is extended by the Supreme Court for good cause. A case involving the sentence of death has priority over all other cases in setting for hearing and in disposition by the Supreme Court.

(11) An appeal may be taken to the Supreme Court or the Court of Appeals, as is appropriate, from all final orders and judgments rendered in a district court or juvenile court under this rule.

(12) An appeal may be taken to the district court from a judgment rendered in the justice court under this rule, except:

(a) the case shall be tried anew in the district court. The decision of the district court is final, except when the validity or constitutionality of a statute or ordinance is raised in the justice court;

(b) within 20 days after receipt of the notice of appeal, the justice court shall transmit to the district court a certified copy of the docket, the original pleadings, all notices, motions, and other papers filed in the case, and the notice and undertaking on appeal;

(c) stay of execution and relief pending appeal are under Rule 27, Utah Rules of Criminal Procedure; or

(d) all further proceedings are in the district court, including any process required to enforce judgment.

(Amended effective November 1, 1996; April 1, 1998.)

Amendment Notes. — The 1996 amendment deleted former Subdivision (11), relating to procedure in appeals from circuit courts; redesignated former Subdivisions (12) and (13) as (11) and (12); substituted "district court" for "circuit court" throughout Subdivision (12); and substituted "Criminal Procedure" for "Court Procedure" in Subdivision (12)(c).

The 1998 amendment added the inclusive language at the end of Subdivision (3)(a) and added Subdivision (3)(f), renumbering accordingly.

Compiler's Notes. — This rule governs appeals from district and juvenile courts. The practice and procedure for taking such appeals, including the time in which the appeal is filed, are prescribed by the Utah Rules of Appellate Procedure.

Cross References. — Appeals from justice court to district court, § 78-5-120.

Appeals to Court of Appeals, § 78-4-11.

Appellate jurisdiction of district courts, Utah Const., Art. VIII, Sec. 5; § 78-3-4.

Appellate jurisdiction of Supreme Court, Utah Const., Art. VIII, Sec. 3; § 78-2-2.

Dismissal if affidavit of impecuniosity is untrue, § 21-7-7.

Judicial Council, Utah Const., Art. VIII, Sec. 12.

Right of defendant to appeal, Utah Const., Art. I, Sec. 12; § 77-1-6.

Right of indigent accused to counsel on appeal, § 77-32-1 et seq.

NOTES TO DECISIONS

Appeal by defendant.

Appeal by prosecution.

—Dismissals.

Appealability.

Applicability of civil rules.

—Court findings.

Attorney's failure to file notice.

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Double jeopardy.

Finality.

Habeas corpus ruling.

Justice court.

Notice of appeal.

Oral statements from bench.

Reversal of order arresting judgment.

Review of acquittal prohibited.

Review of evidence.

Time for appeal.

Cited.

Appeal by defendant.

A purported second judgment and sentence, which was clearly an attempt to render a judgment in criminal proceeding which if valid would have affected defendant's rights, was appealable. *State v. Alexander*, 15 Utah 2d 14, 386 P.2d 411 (1963).

Denial of motion to dismiss on double jeopardy grounds is a "final" judgment; rights protected by the double jeopardy guarantee necessitate review on appeal before a second trial if

CHAPTER 18a

THE APPEAL

Section

77-18a-1. Appeals — When proper.

77-18a-1. Appeals — When proper.

- (1) An appeal may be taken by the defendant from:
 - (a) the final judgment of conviction, whether by verdict or plea;
 - (b) an order made after judgment that affects the substantial rights of the defendant;
 - (c) an interlocutory order when upon petition for review the appellate court decides the appeal would be in the interest of justice; or
 - (d) any order of the court judging the defendant by reason of a mental disease or defect incompetent to proceed further in a pending prosecution.
- (2) An appeal may be taken by the prosecution from:
 - (a) a final judgment of dismissal, including a dismissal of a felony information following a refusal to bind the defendant over for trial;
 - (b) an order arresting judgment;
 - (c) an order terminating the prosecution because of a finding of double jeopardy or denial of a speedy trial;
 - (d) a judgment of the court holding a statute or any part of it invalid;
 - (e) an order of the court granting a pretrial motion to suppress evidence when upon a petition for review the appellate court decides that the appeal would be in the interest of justice;
 - (f) under circumstances not amounting to a final order under subsection (2)(a), a refusal to bind the defendant over for trial on a felony as charged or a pretrial order dismissing or quashing in part a felony information, when upon a petition for review the appellate court decides that the appeal would be in the interest of justice; or
 - (g) an order of the court granting a motion to withdraw a plea of guilty or no contest.

History: C. 1953, 77-18a-1, enacted by L. 1990, ch. 7, § 10; 1995, ch. 65, § 1; 1997, ch. 364, § 1.

Amendment Notes. — The 1995 amendment, effective May 1, 1995, added the phrase

beginning “including a dismissal” to Subsection (2)(a).

The 1997 amendment, effective May 5, 1997, added Subsection (2)(f) and made related stylistic changes.

NOTES TO DECISIONS

“Dismissal.”

A preliminary-hearing magistrate’s order dismissing a felony information and discharging the defendant based on the magistrate’s conclusion that there was insufficient probable

cause to bind the defendant over for trial was “a final judgment of dismissal” and the state was entitled to appeal. *State v. Jaeger*, 886 P.2d 53 (Utah 1994).